UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ABEL BATEN, on behalf of himself, FLSA Collective Plaintiffs, and the Class, Plaintiff, -against- MR. KABOB RESTAURANT, INC., d/b/a/ RAVAGH PERSIAN GRILL, FIRST AVENUE PERSIAN GRILLE, INC. d/b/a RAVAGH PERSIAN GRILL, PARMYS KABOB AND GRILL, INC. d/b/a RAVAGH PERSIAN GRILL, RAVAGH RESTAURANT CORP. d/b/a RAVAGH PERSIAN GRILL, MASOUD TEHRANI, MONIREH TEHRANI, MOJGAN RAOUFI and AMIR RAOUFI, Defendants	Docket No. 16 Civ. 9559

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MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION AND IN SUPPORT OF DEFENDANTS' CROSS MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendants submit this memorandum of law in opposition to plaintiff's motion for certification of a collective action, and in support of their cross motion to dismiss pursuant to Fed. R. Civ. P. Rule 12(c). Plaintiff's claims brought under the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") should be dismissed. The "first-filed" Rule mandates dismissal of plaintiff's case without prejudice. Another similar lawsuit, filed before plaintiff's case, takes priority. Moreover, the complaint fails to state a claim against defendants Parmy's Kabob and Grill, Inc., Mojgan Raoufi, and Amir Raoufi. His conclusory assertions of joint employment are insufficient to state claim.

Even if plaintiff's case is not dismissed, the Court should deny plaintiff's motion for conditional certification. Contrary to his arguments, certification is not automatic and his motion fails to establish the existence of similarly situated employees.

ARGUMENT

POINT I "FIRST-FILED" RULE BARS PLAINTIFF'S MOTION AND CLAIMS

Plaintiff's case and his request for conditional certification fail at the outset. On July 28, 2016, nearly six months before plaintiff filed this case, another employee commenced a nearly identical case, raising the same legal claims against similar defendants. See Juan Riviera-Raymundo v. Ravagh Persian Grill Inc., et al., No. 16 CV 06032 (VSB) (hereinafter "Riviera-Raymundo Complaint").[1] The "first-filed" rule requires dismissal without prejudice of plaintiff's duplicative case.

[1] A copy of Riviera-Raymundo Complaint is attached to the Declaration of David A. Gold (hereinafter "Gold Decl.") as Exhibit A.

"The 'first-filed' rule is a well-settled legal doctrine, instructing that 'where there are two [or more] competing lawsuits, the first suit should have priority, absent the showing of balance of convenience or special circumstances giving priority to the second.'" Wyler-Wittenberg v. MetLife Home Loans, Inc., 899 F. Supp. 2d 235, 243–44 (E.D.N.Y. 2012) (quoting First City Nat. Bank and Trust Co. v. Simmons, 878 F.2d 76, 79 (2d Cir.1989)). The rule provides district courts with broad discretion to dismiss duplicative lawsuits, in the interest of judicial efficiency and to prevent conflicting litigations. Castillo v. Taco Bell of Am., LLC, 960 F. Supp. 2d 401, 404 (E.D.N.Y. 2013) (citing Byron v. Genovese Drug Stores, Inc., 2011 WL 4962499 *2 (E.D.N.Y.2011)).

A. "First-Filed" Rule Applies to this Case

The application of the "first-filed" rule does not require both cases have identical parties or claims. Wyler-Wittenberg, 899 F. Supp. 2d at 244 ("[T]he Second Circuit plainly does not require the first-filed action and the subsequent action to consist of identical parties."); Intema Ltd. v. NTD Labs., Inc., 654 F.Supp.2d 133, 141 (E.D.N.Y.2009) (noting that the "first-filed" rule can be invoked where overlapping factual issues exist between two pending cases); GT Plus, Ltd. v. Ja-Ru, Inc., 41 F. Supp. 2d 421, 424, n. 2 (S.D.N.Y. 1998) ("The first-filed rule can be triggered even when the competing claims do not present the exact same issues.") (citing Manufacturers Hanover Trust Co. v. Palmer Corp., 798 F. Supp. 161, 164 (S.D.N.Y. 1992)).

Here, the claims are identical. Both complaints assert the same claims under NYLL and the FLSA; both name nearly all the same parties; and both seek to create class actions. Both plaintiffs worked in the same position and their overlapping class actions would necessarily include one another. Abushalieh v. Am. Eagle Exp., 716 F. Supp. 2d 361, 366 (D.N.J. 2010) ("Where each set of named plaintiffs intends to represent the other set, the underlying principles of the first-filed rule which seek to avoid 'vexation of subsequent litigation over the same subject matter' and 'the economic waste involved in duplicating litigation,' and to promote 'prompt and efficient administration of justice,' permit this Court to defer to the court of first jurisdiction."). The major differences between the complaints are the number of hours worked and wages paid. These differences alone are not enough to side step the "first-filed" rule.

B. Dismissal Without Prejudice Is Required

"The general rule among federal district courts is to avoid duplicative litigation." Wyler-Wittenberg, 899 F. Supp. 2d at 247. Where there are two competing lawsuits, as in this case, involving the same claims, issues, and parties, "[d]ismissal is appropriate not only to promote docket efficiency and interests of comity, but also to avoid burdening a party with litigating the same matter in separate lawsuits." See Castillo, 960 F. Supp. 2d at 404 (citing Curtis v. Citibank, N.A., 226 F.3d 133, 138 (2d Cir. 2000)).

"[I]t would be patently unfair to require [d]efendants to litigate the class issues here at the same time as those matters are being litigated in the first-filed action." Id. at 405; see also Ortiz v. Panera Bread Co., No. 1:10CV1424, 2011 WL 3353432, at *2 (E.D. Va. Aug. 2, 2011) ("The first-to-file rule is particularly appropriate in the context of competing FLSA collective actions, which threaten to present overlapping classes, multiple attempts at certification in two different courts, and complicated settlement negotiations."). "The doctrine is … meant to protect parties from 'the vexation of concurrent litigation over the same subject matter.'" Curtis v. Citibank, N.A., 226 F.3d 133, 138 (2d Cir. 2000) (quoting Adam v. Jacobs, 950 F.2d 89, 93 (2d Cir. 1991)).

Moreover, "[t]here is simply no reason for this Court to decide nearly identical questions of law and fact …." Thomas v. Apple-Metro, Inc., No. 14-CV-4120 (VEC), 2015 WL 505384, at *4 (S.D.N.Y. Feb. 5, 2015), appeal withdrawn (June 30, 2015); see also Wagner v. Akin Gump Strauss Hauer & Feld LLP, No. 16CIV3532(GBD)(JCF), 2017 WL 176328, at *2 (S.D.N.Y. Jan. 17, 2017) (Dismissing without prejudice "given that the two actions are substantially identical.").

In this case, dismissal is the most appropriate course of action. The lawsuits at issue mirror one another. Plaintiff's counsel seemingly copied many of the boilerplate allegations from Riviera-Raymundo Complaint. Forcing defendants to litigate two identical collective actions at the same time is not only unfair to defendants, but also defeats the purpose class/collective litigation. The underlying purpose of a collective action is to reduce litigation, not duplicate it. If the Court allows plaintiff's case to proceed, defendants will need to litigate the same issues twice at the same time. Castillo, 960 F. Supp. 2d at 404 ("[I]t is precisely such concerns that have led courts here and in other jurisdictions to dismiss … second filed FLSA actions in favor of an earlier filed similar action.").

In addition to wasting judicial resources, litigating identical cases in two separate courts at the same time will possibly, and likely, lead to inconsistent and/or conflicting rulings. Litigating both cases at once will further complicate efforts to settle these cases. See Thomas v. Apple-Metro, Inc., 2015 WL 505384, at *4 ("Retaining jurisdiction of the collective action claims would require the Court to reexamine, albeit at a later date, many of the same issues to be decided in the [other similar cases], and could also potentially interfere with settlement negotiations that might arise in those cases.").

As a result, the Court should dismiss plaintiff's case without prejudice.

POINT II PLAINTIFF FAILS TO STATE A CLAIM AGAINST DEFENDANTS PARMYS KABOB AND GRILL, INC., MOJGAN RAOUFI, AND AMIR RAOUFI

It is axiomatic that in order to state a claim under FLSA or NYLL, plaintiff must demonstrate defendants actually employed plaintiff. Plaintiff's complaint includes no factual allegations showing defendants Parmys Kabob and Grill, Inc., Mojgan Raoufi, and/or Amir Raoufi (collectively "PKG Defendants") employed or violated plaintiff's rights under the FLSA or NYLL.

"An individual or entity may be held liable under the FLSA if it is deemed an 'employer' under the statute." Apolinar v. R.J. 49 REST., LLC, No. 15-CV-8655 (KBF), 2016 WL 2903278, at *3 (S.D.N.Y. May 18, 2016) (citing 29 U.S.C.A. § 203(d) (West)). "Under the FLSA, an 'employer' includes 'any person acting directly or indirectly in the interest of an employer in relation to an employee.'" Id. "[D]etermination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in 'economic reality rather than technical concepts.'" Irizarry v. Catsimatidis, 722 F.3d 99, 104 (2d Cir. 2013) (quoting Barfield v. N.Y. City Health & Hosps. Corp., 537 F.3d 132, 135 (2d Cir. 2008)). "The relevant factors as to whether an employment relationship exists under the FLSA include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. Apolinar, 2016 WL 2903278, at *3 (internal quotations omitted). The same factors apply to claims brought under NYLL. Id. (citing Xue Lian Lin v. Comprehensive Health Mgmt., Inc., No. 08 CIV.6519 (PKC), 2009 WL 976835, at *1 (S.D.N.Y. Apr. 9, 2009)).

Beyond boilerplate conclusory assertions, the complaint fails to establish PKG Defendants employed plaintiff. The complaint does not allege PKG Defendants hired or fired plaintiff, supervised or controlled his employment, determined his rate/method of payment, or maintained his employment records.

Plaintiff's declaration further belies his claims. Throughout his employment, plaintiff made deliveries for one restaurant, located at 11 East 30th Street, New York, New York. See Declaration of Abel Baten ("Baten Decl.") ¶¶ 1, 4. This restaurant was not owned or operated by PKG Defendants and he made no deliveries for these defendants. At the 11 East 30th Street, defendant Masoud Tehrani – not the PKG Defendants – "directly supervised" plaintiff's employment. Baten Decl. ¶¶ 1, 3. He "was in charge of all employment aspects of the staff, including firing and hiring employees." Id. ¶ 3. Plaintiff's declaration says nothing about PKG Defendants other than that Mojgan Raoufi and Amir Raoufi were "known associates" of Masoud Tehrani. Id. ¶ 3. This is far from sufficient to demonstrate an employer-employee relationship. Plaintiff also asserts that the three of them (Mojgan, Amir, and Masoud) ran the restaurants together. Id. But, he includes no facts supporting his conclusory assertion.

Plaintiff cannot salvage his claim by arguing defendants operated as a single enterprise. Conclusory assertions of single or integrated enterprise alone are not sufficient to state a claim. See Klimchak v. Cardrona, Inc., No. 09-CV-4311 (MKB), 2014 WL 3778964, at *6 (E.D.N.Y. July 31, 2014) (failure to state facts showing joint enterprise was fatal to plaintiff's FLSA claim). Additionally, assertions of common ownership alone are insufficient to establish the existence of a single enterprise. Robles v. Argonaut Rest. & Diner, Inc., No. 05 CV 5553 (JSR), 2009 WL 3320858, at *2 (S.D.N.Y. Oct. 9, 2009) ("Common ownership standing alone does not bring unrelated activities within the scope of the same enterprise.") (quoting 29 C.F.R. § 779.211). Rather, plaintiff must allege facts demonstrating the businesses at issue acted in concert and/or were interdependent. See Robles, 2009 WL 3320858, at *2 (must show "operational interdependence"); see also 29 U.S.C.A. § 203(r)(1) (West) (enterprise "means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose …").

In Apolinar v. R.J. 49 REST., LLC, similar to this case, the court addressed the parties' cross motions to dismiss and for conditional certification. Apolinar, 2016 WL 2903278. Plaintiffs brought claims against various corporate and individual defendants who owned and operated delis in the midtown Manhattan, seeking damages under the FLSA and NYLL. Id. Plaintiffs claimed, *inter alia*, moving defendants were single and joint employers that operated "with a 'high degree of interrelated and unified operation' who 'share common management, centralized control of labor relations, common ownership, [a] common control, common website, common business purposes and interrelated goals.'" Id.

"Plaintiffs, in large part, support[ed] their single enterprise theory by relying on a number of conclusory allegations that merely [pled] the presence of the relevant factors necessary to establish common control and joint employer status." Id. The court found no single enterprise, despite plaintiffs' allegations that the businesses shared a website listing the locations of each deli; providing identical menus for each location, and describing the delis as "family owned and operated." Id. at *4. The court held that although plaintiffs pled common ownership, they failed to establish "interrelation of operations or centralized control of labor relations" needed to state a claim. Id.; see also Lopez v. Acme Am. Envtl. Co., No. 12 CIV. 511 WHP, 2012 WL 6062501, at *4 (S.D.N.Y. Dec. 6, 2012) ("Allegations of common ownership and common purpose, without more, do not answer the fundamental question of whether each corporate entity controlled Plaintiffs as employees."). "Plaintiffs [did not] allege that the Moving Corporate Defendants had any sort of direct employer responsibility over them…." Id. "Merely reciting the elements of a joint employer arrangement … [was] insufficient to plausibly allege joint employer status." Id., (citing Cannon v. Douglas Elliman, LLC, No. 06 CIV.7092, 2007 WL 4358456, at *5 (S.D.N.Y. Dec. 10, 2007)).

Plaintiff's claims against PKG Defendants suffer from the same flaws. Plaintiff includes no specific allegations demonstrating joint employer status. As described above, plaintiff does not allege he worked directly for PKG Defendants or that they in any way controlled his employment. In the absence of facts demonstrating interrelation of operations or centralized control, plaintiff cannot state a claim. As a result, plaintiff's claims against PKG Defendants should be dismissed.

POINT III CERTIFICATION OF A COLLECTIVE ACTION IS NOT AUTOMATIC

Contrary to plaintiff's arguments, certification of a collective action is not, and should not be, automatic. Sanchez v. JMP Ventures, L.L.C., No. 13 CIV. 7264 (KBF), 2014 WL 465542, at *1 (S.D.N.Y. Jan. 27, 2014); see also Romero v. H.B. Auto. Grp., Inc., No. 11 CIV. 386 (CM), 2012 WL 1514810, at *10 (S.D.N.Y. May 1, 2012) ("certification is not automatic.") (internal quotations omitted).

It is well established, before conditionally certifying a collective class action under 29 U.S.C. § 216(b), plaintiff must submit evidence "sufficient to demonstrate that [current] and potential plaintiffs together were victims of a common policy or plan that violated the law." Guan Ming Lin v. Benihana Nat. Corp., 275 F.R.D. 165, 173 (S.D.N.Y. 2011) (quoting Realite v. Ark Restaurants Corp., 7 F.Supp.2d 303, 306 (S.D.N.Y.1998)); see also Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 540 (2d Cir. 2016) (plaintiff must make factual showing); Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010) (same); Bahr v. PNW Enterprises, LLC, No. 16-CV-1223 (PKC), 2017 WL 816140, at *1 (S.D.N.Y. Mar. 1, 2017) (plaintiff must make factual showing which "cannot be satisfied simply by 'unsupported assertions.'"). This is a burden plaintiff cannot meet.

Plaintiff, therefore, argues the Court should ignore the Second Circuit's approach and do away with his obligation to make a factual showing. Looking to Turner v. Chipotle Mexican Grill, Inc., 123 F. Supp. 3d 1300, 1301 (D. Colo. 2015), plaintiff argues the Court should adopt a new approach, permitting him to send out a notices without making any factual showing. This would necessarily lead to plaintiffs sending notices out in every FLSA case, regardless of whether other similarly situated employees existed.

No other court has adopted the approach in Turner, much less any court in the Second Circuit. Plaintiff disingenuously characterizes Turner as the "minority view," yet he cites nothing to support this assertion. In the two years since Turner was decided, no court has followed its suggested approach. Tellingly, plaintiff cites nothing. If anything, the opposite has occurred. See e.g., Augustyniak v. Lowe's Home Ctr., LLC, No. 14-CV-00488-JJM, 2016 WL 462346, at *2 (W.D.N.Y. Feb. 8, 2016) (rejecting Turner). Plaintiff's counsel conveniently omit that they recently made this same argument in Garcia v. Chipotle Mexican Grill, Inc., No. 16 CIV. 601 (ER), 2016 WL 6561302, n. 9 (S.D.N.Y. Nov. 4, 2016) and the court ignored plaintiff's counsel's invitations to abandon the Second Circuit's approach.

Moreover, Turner itself cites no case law supporting its approach. Rather, the decision appears to be a reaction to a unique and tortured procedural history, something not present here.[2]

[2] Turner filed her complaint in 2013. Turner, 123 F. Supp. 3d at 1304. She withdrew it after learning about another class action in another state. The magistrate judge in the other case recommended the court certify a nationwide class action, which would have included Turner. Nearly a year after Turner discontinued her case, the district judge disagreed with the magistrate judge, limiting the collective action to one store. Turner then refiled her case. The case was further delayed by the court's pilot program regarding consent jurisdiction and reassignment to a magistrate judge. Defendants then moved to dismiss plaintiff's case on the grounds of claim preclusion and res judicata. These circumstances do not exist in this case. Until plaintiff filed his surprise motion, the case was

The principles of *stare decisis*, contrary to plaintiff's arguments, require the Court to reject, not grant, his request to depart from Second Circuit precedent. Black's Law Dictionary defines *stare decisis* as: "The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." Black's Law Dictionary (10th ed. 2014). "[A]ny departure from the doctrine of *stare decisis* demands special justification." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 559, 105 S. Ct. 1005, 1022, 83 L. Ed. 2d 1016 (1985) (quoting Arizona v. Rumsey, 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984)). "Considerations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for" a long period of time. IBP, Inc. v. Alvarez, 546 U.S. 21, 32, 126 S. Ct. 514, 523, 163 L. Ed. 2d 288 (2005). No special justification exists in this case. Since 2010, courts in the Second Circuit have uniformly followed and applied the standards set forth in Myers v. Hertz Corp., 624 F.3d 537, 542 (2d Cir. 2010). *Stare decisis* requires this Court do the same.

The plethora of cases denying or curtailing the scope of collective actions, even though plaintiffs only need to make a modest showing, underscore the necessity of this requirement. See, e.g., Khan v. Airport Mgmt. Servs., LLC, No. 10 CIV. 7735 NRB, 2011 WL 5597371, at *4 (S.D.N.Y. Nov. 16, 2011) (failed to show other employees had to perform unpaid non-managerial tasks); Jin Yun Zheng v. Good Fortune Supermarket Grp. (USA), Inc., No. 13-CV-60 ILG, 2013 WL 5132023, at *5 (E.D.N.Y. Sept. 12, 2013) (rejecting collective motion due to "insufficient evidence of a common policy or plan"); Fa Ting Wang v. Empire State Auto Corp., No. 14-CV-1491 WFK VMS, 2015 WL 4603117, at *9 (E.D.N.Y. July 29, 2015) (conclusory

proceeding smoothly. Defendant's provided plaintiff with pre-discovery documentation and the parties planned to mediate the case either before a magistrate judge or the Court's mediation panel.

assertions not enough); Hamadou v. Hess Corp., 915 F. Supp. 2d 651, 666 (S.D.N.Y. 2013) (limiting scope of class). A collective action is not appropriate in every case.

All too often, plaintiffs use motions for collective action for tactical reasons rather than as a device to limit and/or consolidate litigation.[3] Under plaintiff's approach, the proverbial flood gates would be open, exponentially increasing motion practice, delaying employees' ability to obtain relief where warranted, and wasting precious judicial resources.

POINT IV PLAINTIFF FAILED TO MEET HIS BURDEN TO CERTIFY A CLASS

A. Plaintiff's Self Serving Declaration Is Not Sufficient To Certify A Class

Plaintiff's regurgitated summary of the allegations in his complaint and his list of employees, identified only by first name, is far from sufficient to certify a collective action. Plaintiff's declaration offers no facts or evidence demonstrating the existence of similarly situated prospective plaintiffs.

Plaintiff cannot meet his burden relying solely on unsupported assertions. See Myers v. Hertz Corp., 624 F.3d at 555 (certification requires more than unsupported assertions). Plaintiff must provide specific factual support demonstrating that the alleged violations extend beyond his own circumstances. Levinson v. Primedia Inc., No. 02 CIV. 2222 (CBM), 2003 WL 22533428, at *2 (S.D.N.Y. Nov. 6, 2003) (certification denied where plaintiffs failed to "provide a factual showing that extend[ed] beyond their own circumstances.").

[3] At the initial conference the parties agreed it was in the best interest of all the parties to mediate. Defendants' cross motion to dismiss should come as no surprise to plaintiff's counsel. Prior to speaking with the Court, plaintiff inquired about stipulating and/or moving for a collective action. Defense counsel informed plaintiff about the other pending case and suggested rather than wasting the Court's time with motion practice, that the parties try to mediate. During the Initial Conference before the Court, plaintiff's counsel made no mention to his intent to move for a collective action.
This is far from a strong case for plaintiff. In contrast to plaintiff's allegations, defendants maintained records showing plaintiff was properly paid. Plaintiff's surprise motion for a collective action is little more than an inappropriate tactic to gain an extra bargaining chip for the upcoming mediation of this case.

Plaintiff further cannot rely on nonspecific observations and conversations alone. Reyes v. Nidaja, LLC, No. 14 CIV. 9812, 2015 WL 4622587, at *2 (S.D.N.Y. Aug. 3, 2015). "[I]nformation regarding 'where or when these observations or conversations occurred … is critical in order for the Court to determine the appropriate scope of the proposed class and notice process.'" Mata v. Foodbridge LLC, No. 14 CIV. 8754 ER, 2015 WL 3457293, at *4 (S.D.N.Y. June 1, 2015) (quoting Sanchez v. JMP Ventures, L.L.C., 2014 WL 465542, at *1 (S.D.N.Y. 2014).

In Fernandez v. On Time Ready Mix, Inc., the Court denied plaintiff's motion despite his assertions that "'all of the drivers employed by the Defendant' were subject to defendant's policies not to pay overtime compensation and that he learned these facts from conversations with some of those drivers." Fernandez, No. 14 CIV. 4306 (BMC), 2014 WL 5252170, at *2 (E.D.N.Y. Oct. 4, 2014) (quoting plaintiff Fernandez's declaration). "The paucity of information about these conversations … underscore[d] that plaintiff" failed to establish "a 'factual nexus' between his situation and that of the other drivers, none of whom may actually have been victims of defendant's allegedly illegal policies." Id. As the court explained:

> The reason for requiring at least some specific information is obvious. There is no way to test what plaintiff has stated. We might as well just take his word for it that he has talked to some number of unnamed other workers, made his own evaluation of what they have told him, and authorize the sending of notice on his say-so. But minimal as the test is, it is more than that.

Id. at *2. Moreover, "[i]t is one thing to allow hearsay on this kind of motion." Id. "It is quite another to allow hearsay coupled with vague generalities and conclusions that give no information at all about the employer's practices towards others." Id. "Plaintiff's motion would effectively eliminate any standard of proof for collective action notice." Id.

Here, plaintiff provides almost no information beyond conclusory assertions. He allegedly gathered information from observations and conversations with other employees, but provides no context or specifics. The only information he provided was a list of first names of employees. He does not specify how many hours the employees worked or what defendants paid them. He does not identify when he talked to these other employees or what they talked about. He does specify what he observed, when, or where he observed it.

Plaintiff cannot rely on affidavits submitted in Tamay, et al., v. Mr. Kabob Restaurant Inc., et al., to help cure the deficiencies in his declaration. Plaintiff neither states that he worked with any of these employees nor does he claim that he observed or spoke to them. If a notice for collective action is sent out, none of these individuals will be able to participate in the case. Each of them settled their claims with defendants, agreed to a general release, and stipulated to discontinue with prejudice.[4] These employees are therefore no longer similarly situated and plaintiff cannot point to them as examples of the types of employees who would be included in his collective action. In the absence of evidence, demonstrating the existence of similarly situated employees with viable claims, plaintiff's motion must be denied.

B. Plaintiff's Declaration Is Not Credible

Plaintiff argues the underlying merits of the case are immaterial to his request for conditional certification, but the Court need not and should not turn a blind eye to the unmistakably false assertions made throughout plaintiff's declaration. Plaintiff's motion hinges on the validity of his declaration. Evidence calling into question his assertions is directly relevant to evaluating his request.

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[4] A copy of the Stipulation and Order of Dismissal is annexed to Gold Decl. as Exhibit B.

In his declaration, plaintiff falsely asserts "[a]t all times throughout [his] employment …, [he] worked seventy-two (72) hours per week from 11:00 a.m. to 11:00 p.m. for six (6) days a week, without any lunch or dinner breaks." See Baten Decl. ¶ 5. Plaintiff's time sheets show that he never worked close to 72 hours per week.[5] Contrary to plaintiff's assertions, he was required to clock in and out during his employment. He generally worked between five and five and half days per week. Ex. C. Each day plaintiff worked a full day, he took a one hour break. Id. The highest number of hours plaintiff worked in a single week was 62 hours. Id. The rest of the time, he worked considerably less, averaging 45 hours per week. Id.

Plaintiff claims defendants paid him a fixed salary. Baten Decl. ¶ 5. This is also false. Defendants paid plaintiff hourly.[6] Plaintiff's personal earning statements show he was not paid a fixed salary and he received overtime pay. Ex. D. Moreover, plaintiff signed each of the personal earning statements. Id.

Plaintiff also claims defendants never properly informed him about tip credit or provided him with a wage and hour notice. Baten Decl. ¶¶ 6, 10. Defendants not only verbally explained the tip credit to plaintiff, but they also provided plaintiff with a pay notice.[7]

Similarly, plaintiff falsely claims defendants failed to pay him spread of hours pay. Baten Decl. ¶ 8. Plaintiff's earning reports show the opposite.[8]

In his declaration, plaintiff asserts that he worked for defendants from November 2009 to October 2016, giving the misleading impression he worked every week during that time period.[9]

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[5] Copies of plaintiff's time sheets are annexed to Gold Decl. as Exhibit C.
[6] Copies of plaintiff's personal earning statements are annexed to Gold Decl. as Exhibit D.
[7] Copies of plaintiff's pay notice are annexed to Gold Decl. as Exhibit E.
[8] Copies of plaintiff's earning reports are annexed to Gold Decl. as Exhibit F.

Not only do defendants dispute that plaintiff started working for them in November 2009, but his assertion that he worked every week during his employment is simply false. In January 2016, a fire broke out in the restaurant.[10] The restaurant remained close until April 2016. Plaintiff worked no hours, let alone overtime, during this time period. Regardless, he is still seeking damages for this time period.

These plainly false assertions undermine his request for a conditional certification. As a result, the Court should deny plaintiff's motion.

POINT V PLAINTIFF'S PROPOSED CLASS IS OVERLY BROAD

Even if the Court finds plaintiff met his burden, he has failed to submit sufficient evidence warranting notices be sent to "all non-exempt employees, including delivery persons, salad preparers, food preparers, line cooks, cooks, servers, bussers and dishwashers, employed by Defendants at each of their restaurants within the last six (6) years."

A. The Class Should be Limited To Only The Restaurant Where Plaintiff Worked

Throughout his entire employment, plaintiff worked at only one restaurant, located at 11 East 30th Street, New York, New York. See Baten Decl. ¶ 1. His declaration is far from sufficient to warrant certifying a collective action that extends beyond the four corners of the restaurant he worked at.

Broad unsubstantiated claims of a "common enterprise" or "integrated enterprise" are insufficient to justify a motion for collective certification. See e.g. Levinson v. Primedia Inc., No. 02 CIV.2222 (CBM), 2003 WL 22533428, at *2 (S.D.N.Y. Nov. 6, 2003) (Despite claims of a "company-wide" policy, plaintiff motion denied due to the absence any factual showing that

[9] Plaintiff's damage calculations confirm he intends to claim that the worked every week from November 2009 to October 2016.

[10] A copy of an inspection report by the New York City Department of Health and Mental Hygiene is annexed to Gold Decl. as Exhibit G.

plaintiff's allegations of FLSA violation actually extended beyond his own circumstances.); Hamadou v. Hess Corp., 915 F. Supp. 2d 651, 666 (S.D.N.Y. 2013) (Scope of class limited in the absence any specific evidence of employment violations or evidence of a *de facto* policy.). As described above, plaintiff's declaration does not establish that the Ravagh Persian Grill restaurants constituted an integrated enterprise.

Moreover, the absence of "concrete facts" is fatal to plaintiff's application. See Mata, 2015 WL 3457293, at *3 (denying conditional certification where plaintiff presented "no concrete facts evidencing a common scheme or plan of wage and hour violations for employees engaged in different job functions."); Qing Gu v. T.C. Chikurin, Inc., No. CV 2013-2322 SJ MDG, 2014 WL 1515877, at *3 (E.D.N.Y. Apr. 17, 2014) (denying conditional certification where "Plaintiffs make only general allegations that other employees of defendants were denied minimum wage and overtime compensation."); see Khan v. Airport Mgmt. Servs., LLC, No. 10 CIV. 7735 NRB, 2011 WL 5597371, at *4 (S.D.N.Y. Nov. 16, 2011) (conclusory assertions of personal knowledge not sufficient).

In Laroque v. Domino's Pizza, LLC, four delivery-drivers submitted declarations, moving to certify a class that included five pizzerias. Laroque v. Domino's Pizza, LLC, 557 F. Supp. 2d 346, 348 (E.D.N.Y. 2008). All four plaintiffs only worked at one pizzeria. Id. at 349. Plaintiffs, however, claimed that an unknown employee, identified only as "Joseph," informed them that Domino's intentionally underpaid its hourly employees at all stores where he had worked. Id. The court could not justify certifying a class, likely numbering hundreds of prospective plaintiffs, "on the basis of such thin factual support." Id. at 356.

In Jin Yun Zheng v. Good Fortune Supermarket Group (USA), Inc., plaintiff sought to certify a class that included the supermarket where she worked and two other branch stores where defendants allegedly engaged in the same illegal employment practices. Jin Yun Zheng v. Good Fortune Supermarket Grp. (USA), Inc., No. 13-CV-60 ILG, 2013 WL 5132023, at *1 (E.D.N.Y. Sept. 12, 2013). Plaintiff based her motion on observations that other employees worked a similar schedule and were allegedly not compensated properly. Id. She also learned from coworkers "that it was defendants' policy to not provide proper written notice to all supermarket clerks" who worked at defendants' stores. Id.

The court denied plaintiff's motion, finding her submissions insufficient. Id. at *5. Plaintiff failed to identify any of the employees she allegedly observed or spoke to. Id. She provided no evidence to support her claims. She "merely restated her conclusory factual allegations in a variety of forms." Id. The absence of detail was "fatal to plaintiff's motion." Id.; see also Fa Ting Wang v. Empire State Auto Corp., No. 14-CV-1491 WFK VMS, 2015 WL 4603117, at *10 (E.D.N.Y. July 29, 2015) (denying certification where plaintiff failed to provide basis for his assertion that other similarly situated employees were not compensated at minimum wage or paid overtime).

Here, plaintiff presents no facts demonstrating the existence of a common/integrated enterprise of operations. His declaration includes no concrete facts showing that employees at other restaurants were victims of a common scheme or plan. Nor can he make this showing. Plaintiff worked in a non-managerial position as a delivery man at only one restaurant. Id., ¶¶ 1, 4.

It should come as no surprise to plaintiff's counsel that Baten's declaration is insufficient to certify a collective action involving restaurants that he never worked at. In Guan Ming Lin v. Benihana Nat'l Corp., counsel submitted several declarations by plaintiff employees that made similar conclusory nonspecific claims as those included in Baten's declaration. Guan Ming Lin

v. Benihana Nat'L Corp., 755 F. Supp. 2d 504, 512 (S.D.N.Y. 2010). Plaintiff employees claimed that they observed other employees receive less than minimum wage and that other delivery employees at other restaurants suffered labor law violations. Guan Ming Lin, 755 F. Supp. 2d at 510. The court found plaintiffs' conclusory assertions and nonspecific observations to be insufficient to certify any collective action, let alone one that extended to locations where plaintiffs did not work. Id. at 513.

Plaintiff similarly relies exclusively on vague assertions and nonspecific observations. The fact that plaintiff provided a list of first names in his declaration is meaningless. It tells the Court nothing about the wage and hour practices at the other restaurant locations and does not demonstrate the existence of similarly situated employees.

Beyond providing first names, plaintiff gives no specifics about what he observed or what he said to any of these individuals. He does not state when he spoke to these individuals or how often he spoke to them. He provides no details identifying: (1) the number of hours these individuals worked; (2) what days of the week they worked; (3) how much they were paid per hour; and/or (4) how long they worked for defendants. Plaintiff submitted no affidavits or declarations from any of these employees.

Further, according to plaintiff's declaration, the majority of the individuals he identified worked at the same location as plaintiff. The few other names provided allegedly worked at two other locations in New York City. Plaintiff provides no details describing the employment of these individuals. He further fails to explain any basis for his conclusory assertion that these other individuals are similarly situated.

Plaintiff does not identify any employees who allegedly worked at the restaurants located in Nassau and Suffolk Counties. At the very least, the employees working at these restaurants should be excluded from any collective notice.

In the absence of any personal knowledge, evidence, affidavits, or specific allegations; plaintiff's declaration amounts to nothing more than a series of empty assumptions. Plaintiff's burden is not non-existent and cannot be met by relying on baseless assumptions.

B. The Collective Notice Should Only Be Sent To Delivery Personnel

Plaintiff bears the burden of proving that all putative class members were victims of defendants' alleged improper employment practices. See e.g. She Jian Guo v. Tommy's Sushi Inc., 2014 WL 5314822, at *3 (Court denied request for class of "all of those hourly paid, non-managerial employees of the defendants, including but not limited to chefs, waiters, kitchen workers, dishwashers, and delivery persons or any other equivalent employee" who has worked at Oriental Cafe at any time in the past three years and has suffered a violation of the FLSA or NYLL."). Applications for collective certification cannot rely on "vague, conclusory, and unsupported assertions." Id.

In Mata v. Foodbridge LLC, plaintiff, a pizza counterperson, sought to certify a class comprised of "cooks, line-cooks, food preparers, dishwashers, delivery persons, counter persons, and cashiers employed by [d]efendants within the last six years." Mata, 2015 WL 3457293, at *3. Even though plaintiff's declaration listed the names and titles of 17 coworkers that he observed doing the same or similar work, "he included no concrete facts evidencing a common scheme or plan of wage and hour violations for employees engaged in different job functions." Id. In the absence of factual support demonstrating a common scheme or plan, plaintiff's motion failed. Id.; see also Tapia-Castrejon v. Sahara E. Rest. Corp., No. 14CV8080, 2015 WL

5022654, at *2 (S.D.N.Y. Aug. 18, 2015) (Motion denied where plaintiff failed "to provide concrete facts 'demonstrating knowledge of a common scheme impacting the diverse array of employees' he [sought] to include in his proposed class.") (quoting Mata, 2015 WL 3457293, at *3.); Boice v. M+W U.S., Inc., No. 1:14-CV-0505 (GTS)(CFH), 2015 WL 5316115, at *13 (N.D.N.Y. Sept. 11, 2015) (same).

Beyond conclusory assertions, plaintiff includes nothing in his declaration demonstrating that employees with other job functions were similarly situated to him. In the absence of specific facts or evidence, plaintiff's class should be limited to delivery persons only.

C. The Collective Notice Period Should Be Limited Three Years

In addition to seeking to conditionally certify an overly broad class, plaintiff requests to include individuals employed by defendants over the past six years, far beyond the federal statute of limitations. The FLSA's statute of limitations is at most three years. See 29 U.S.C.A. § 255(a) (West). Plaintiff's motion for a conditional certification, made pursuant to federal law, should comport with the applicable federal statute of limitation.

A growing number of federal courts have limited the notice period to three years. See, e.g., Garcia v. Chipotle Mexican Grill, Inc., No. 16 CIV. 601 (ER), 2016 WL 6561302, at *9 (S.D.N.Y. Nov. 4, 2016) (three year notice period); Hamadou v. Hess Corp., 915 F. Supp. 2d 651, 668 (S.D.N.Y. 2013) (same); Lujan v. Cabana Mgmt., Inc., 2011 WL 317984, at *9 (E.D.N.Y. Feb. 1, 2011) (same); McBeth v. Gabrielli Truck Sales, Ltd., 768 F.Supp.2d 396, 400 (E.D.N.Y.2011) (collecting cases). In LeGrand v. Educ. Mgmt. Corp., No. 03 CIV.9798(HB)(HBP), 2004 WL 1962076, at *3, n. 2 (S.D.N.Y. Sept. 2, 2004), the court held:

> The longest applicable limitations period to plaintiffs' FLSA claim is three years if willful violations are established. 29 U.S.C. § 255(a). Thus,

> any potential plaintiff whose claim is more than three years old has a state law claim only. In the absence of diversity and a claim for damages in excess of $75,000 (which seems unlikely), the Court would have no subject matter jurisdiction over claims that are more than three years old since such claims would be pure state law claims. There is no reason to provide an opt-in notice to a plaintiff whose claims could not be asserted in this Court.

Plaintiff is not seeking to certify a class under the NYLL. There is no reason to cut any procedural corners or to notify employees about a claim that they cannot participate in. See Lujan v. Cabana Mgmt., Inc., No. 10-CV-755 (ILG), 2011 WL 317984, at *9 (E.D.N.Y. Feb. 1, 2011) ("The purpose of the instant motion is to notify and inform those eligible to opt in to the collective action, and time-barred former employees may not do so."); Ramos v. PJJK Rest. Corp., No. 15–CV–5672, 2016 WL 1106373, at *5 (S.D.N.Y. Mar. 10, 2016) ("plaintiffs have not moved to certify a class under the NYLL ... [and] do not explain how efficiency or judicial economy are enhanced if the collective action notice includes a six-year limitations period for NYLL claims that have not received class certification"); Garcia v. Spectrum of Creations Inc., 102 F.Supp.3d 541, 551 (S.D.N.Y.2015) ("If a class is certified under New York law, class members will receive notice at that time through the class action notification process.").

As a result, if the Court grants plaintiff's motion for conditional certification, the notice period should be limited to three years.

POINT V OBJECTIONS TO PLAINTIFF'S PROPOSED NOTICE

Defendants object to plaintiff's proposed Notice and Consent forms to potential class members.[11] Defendants' proposed changes/edits are outlined below:

[11] For the Court's convenience, a redline edited version of plaintiff's Notice and Consent forms is annexed to Gold Decl. as Exhibit H.

A. The Notice and Consent Forms Should Conform to the Scope of the Collective Action

As described above, defendants object to the scope of plaintiff's proposed class. Defendants request that plaintiff's Notice and Consent forms conform to the scope of the class that the Court certifies.

B. The Notice Period Should be limited to Three Years

Plaintiff seeks to notify a class of workers employed by defendants over the past six years. As explained above, this is far beyond the applicable statute of limitations. All dates on plaintiff's Notice and Consent form should be limited to three years prior to the date of the entry of the order certifying the collective action – not six years from the commencement of the case. Romero v. Flaum Appetizing Corp., No. 07 CIV. 7222(BSJ), 2009 WL 2591608, at *5 (S.D.N.Y. Aug. 17, 2009) (Notice limited to three years "from the date of entry of this Order, not from the date of the commencement.").

Additionally, plaintiff's Notice should not include any reference to plaintiffs' claims under New York State Law. In comparison to FLSA claims, New York Labor Law claims are opt-out. There is no need to reference them in plaintiff's Notice.

C. Defense Counsel's Contact Information Should Be Included on the Notice Form

Inclusion of defense counsel's contact information is routine and necessary to afford employees the opportunity to communicate with defense counsel. See e.g. She Jian Guo v. Tommy's Sushi Inc., 2014 WL 5314822, at *4; Mendoza v. Ashiya Sushi 5, Inc., No. 12 CIV. 8629 KPF, 2013 WL 5211839, at *7 (S.D.N.Y. Sept. 16, 2013) ("FLSA notices routinely include [defense counsel's contact information] information.").

D. Defendants' Edits to the Type of Information Opt-In Plaintiffs Will Need to Provide Are Reasonable

Finally, defendants wish to add to the section of plaintiffs' Notice describing what kind of information opt-in plaintiffs may be required to provide. Romero v. Flaum Appetizing Corp., 2009 WL 2591608, at *6 (Reasonable modifications are permissible.). This information is appropriate "[t]o help potential opt-in plaintiffs make an informed decision about whether to join this litigation." Id. Changes such as that plaintiff may need to disclose their social security number or provide information about their residence are reasonable and within the scope of information defendants may request during discovery. See e.g. Moore v. Eagle Sanitation, Inc., 276 F.R.D. at 61 (The addition that plaintiff may need to "pay costs if they do not prevail" is reasonable.)

POINT VI OBJECTIONS TO PLAINTIFF'S DEMAND FOR CONTACT INFORMATION

In his motion, plaintiff demands the names, last known addresses, telephone numbers (including cell phone numbers), email addresses, and social security numbers of all prospective plaintiffs. This demand is premature, overbroad, and unduly burdensome.

"The notice and opt-in process outlined by the FLSA is not a discovery device to determine whether conditional certification is appropriate." Sanchez v. JMP Ventures, L.L.C., 2014 WL 465542, at *2. Rather "the purpose of granting conditional certification is 'to facilitate the sending of notice to potential class members.'" She Jian Guo v. Tommy's Sushi Inc., 2014 WL 5314822, at *3.

Plaintiff's request for telephone numbers, email addresses, and social security numbers is premature and potentially unnecessary. See e.g. Gonzalez v. Scalinatella, Inc., No. 13 CIV. 3629 PKC, 2013 WL 6171311, at *5 (S.D.N.Y. Nov. 25, 2013) ("At this juncture, [defendant] need not disclose telephone numbers, email addresses, titles, compensation rates, or period of employment" until after mailing is returned as undeliverable.). Rather than forcing defendants to provide contact information that may be completely unnecessary, plaintiff's request should be limited to mailing addresses for the employees. If plaintiff's mailing is returned as undeliverable then the parties can explore other options and means to contact potential class members.

POINT VII PLAINTIFF PROVIDES NO BASIS TO TOLL THE STATUTE OF LIMITATIONS

Without any basis, plaintiff requests that if this Court grants his motion for conditional certification that it tolls the FLSA statute of limitations. Contrary to plaintiff's assertions equitable tolling is the exception, not the rule. "Equitable tolling is appropriate only in rare and exceptional circumstances, where a plaintiff has been prevented in some extraordinary way from exercising his rights.'" Garcia, 2016 WL 6561302, at *10 (quoting Vasto v. Credico (USA) LLC, No. 15 CIV. 9298 (PAE), 2016 WL 2658172, at *16 (S.D.N.Y. May 5, 2016)); see also Johnson v. Nyack Hosp., 86 F.3d 8, 12 (2d Cir. 1996) (equitable tolling only appropriate when plaintiff has been "prevented in some extraordinary way from exercising his rights, or h[as] asserted his rights in the wrong forum.") (quoting Miller v. International Tel. & Tel. Corp., 755 F.2d 20, 24 (2d Cir.), *cert. denied*, 474 U.S. 851, 106 S.Ct. 148, 88 L.Ed.2d 122 (1985).

Plaintiff points to nothing warranting the tolling of the statute of limitations. The cases plaintiff cites do not support his assertion that courts "increasingly grant requests" to toll statute of limitations. If anything the decisions plaintiff cites limit the application. See Jackson v. Bloomberg, L.P., 298 F.R.D. 152, 170 (S.D.N.Y. 2014) (tolled statute of limitations after it took the court seven months to decide plaintiff's motion to conditionally certify and there was a real danger substantial numbers of prospective plaintiffs' claims would be time barred); Glatt v. Fox Searchlight Pictures Inc., No. 11 CIV. 6784 WHP, 2013 WL 4834428, at *1 (S.D.N.Y. Aug. 26, 2013) (granting request to equitably toll after substantial delay by the court in deciding plaintiff's motion); Kemper v. Westbury Operating Corp., No. CV 12-0895 ADS ETB, 2012 WL 4976122, at *3 (E.D.N.Y. Oct. 17, 2012) (tolling statute of limitations from the date of plaintiff's motion rather than from the date of mailing due to delay in deciding motion); McGlone v. Contract Callers, Inc., 867 F. Supp. 2d 438, 445 (S.D.N.Y. 2012) (same).

Here, no extraordinary delay has taken place warranting the tolling of the statute of limitations. Plaintiff's motion has been pending for less than two weeks. This delay is not sufficient to warrant the tolling of the statute of limitations. See Vasto v. Credico (USA) LLC, No. 15 CIV. 9298 (PAE), 2016 WL 2658172, at *16 (S.D.N.Y. May 5, 2016) (seven month delay not sufficient to warrant equitable tolling); Mark v. Gawker Media LLC, No. 13-CV-4347 AJN, 2014 WL 5557489, at *3 (S.D.N.Y. Nov. 3, 2014) (11 month delay neither "extraordinary" nor warranted tolling of statute of limitations).

CONCLUSION

For all the foregoing reasons, defendants request that this Court deny plaintiff's motion for a collective action in its entirety and grant their cross motion to dismiss, together with such other relief as this Court may deem just, equitable, and proper.

Dated: Carle Place, New York
April 13, 2017

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